

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Criminal Action
)	No. 13-10200-GAO
)	
DZHOKHAR A. TSARNAEV, also)	
known as Jahar Tsarni,)	
)	
Defendant.)	
)	

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

LOBBY CONFERENCE

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Monday, March 9, 2015
8:50 a.m.

Marcia G. Patrisso, RMR, CRR
Official Court Reporter
John J. Moakley U.S. Courthouse
One Courthouse Way, Room 3510
Boston, Massachusetts 02210
(617) 737-8728

Mechanical Steno - Computer-Aided Transcript

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P R O C E E D I N G S

THE COURT: Good morning.

I just wanted to get a sense of where we're going and what the week holds and so on. Did you have a lineup?

MR. WEINREB: So we're going to begin this morning with the last of the victim witnesses who will testify about what happened at Scene B, the Forum. Then we're going to --

THE COURT: How many?

MR. WEINREB: There are four all together.

And then we are going to move into the identification of the brothers as suspects. Also, his -- placing him at the scene immediately afterwards and where he was in the day or two following. Then --

THE COURT: Is that by video evidence?

MR. WEINREB: That's by video evidence, swipe card at UMass Dartmouth, video at the Whole Foods, and at the UMass fitness center swipe card data.

Then we are going to go into -- oh, and some Twitter tweets.

Then we're going to go into the collection of evidence at Boylston Street, and after that the press conference at which the identification of the suspects was made public, and from there into --

THE COURT: That's going to be narrowed?

MR. WEINREB: Yes.

1 THE COURT: Have you shared the narrowing?

2 MR. BRUCK: Yes. And we've told them we're fine with
3 one of the two stills, and I think the other still has a little
4 bit of the same problems, but it's a big improvement over
5 the -- so we object to one; we don't object to other.

6 THE COURT: So there will be no video; there will just
7 be a couple of stills. Is that it?

8 MR. BRUCK: That's what Al indicates.

9 MR. WEINREB: They know more than we do.

10 THE COURT: All right. Division of labor.

11 MR. BRUCK: Let me handle this.

12 MR. WEINREB: And then we'll begin with the
13 presentation of the evidence of the murder of Sean Collier
14 followed by the carjacking of Dun Meng, and basically a
15 chronological account.

16 THE COURT: Okay. This proceeded a little
17 unexpectedly quickly. I mean, does that affect our overall
18 assessment of when we might get to a second phase?

19 MR. WEINREB: I think so. I mean, it's a little hard
20 to know whether it's going to continue at this pace. In some
21 respects that's up to defense counsel. But one thing we were
22 going to propose is that we had made our pitch early on that we
23 not necessarily go full days every day. The Court had said you
24 would readjust as time went on.

25 We -- it might be helpful, I think to both sides, if

1 we had a little extra time to be prepping witnesses, to be
2 sharing exhibits with the defense that they want to see and so
3 on. So, for example, what we'd very much like to do is, if
4 it's conceivable, we would reach the Sean Collier piece of the
5 presentation by tomorrow afternoon --

6 THE COURT: Really?

7 MR. WEINREB: -- which would be lightning fast.

8 Again, I don't know. It depends a lot on the
9 cross-examination.

10 THE COURT: Or non-cross-examination.

11 MR. WEINREB: -- or non-cross-examination.

12 If there isn't any, then we definitely would like to
13 delay until Wednesday morning. And I'm sure the defense will
14 agree because they'll want to take a look at the exhibits -- I
15 don't want to speak for you.

16 MS. CLARKE: It is a little bit of a chaotic system
17 right now, due to the pace, of figuring out which exhibits
18 connect to which witnesses and do we have the exhibits and that
19 kind of thing. And prosecution counsel has been pretty good
20 about trying to keep up. I mean, I imagine we'll hit the same
21 problem in the penalty phase for us.

22 THE COURT: Okay. Well, yeah, I don't want to make
23 any change wholesale, you know, on a -- on a particular day it
24 makes sense to postpone something till the next day, we could
25 take that as it comes. I would like to still keep -- try to be

1 efficient. You know, we have a lot of people we're
2 inconveniencing next door, and I would like to have that
3 limited.

4 MR. WEINREB: I would say that the pace does, from our
5 perspective, make certain -- the pending motions in limine a
6 little more pressing, particularly the boat, from our
7 perspective.

8 THE COURT: Yeah. So about the boat, I want to -- I
9 think the best way for me to assess it is to look at it. Now,
10 I don't know whether -- what you want. I'd expect that at
11 least one person from each side would be there but I don't know
12 that everybody has to be there. And so one possibility might
13 be if we had a shorter day, say, Tuesday or Wednesday,
14 whatever.

15 Where is it? Is it at the Black Falcon.

16 MR. WEINREB: No; it's in Wilmington.

17 THE COURT: In Wilmington? Okay. Whether if I could
18 take an hour and go out there or something like that.

19 MR. BRUCK: Couldn't the boat rather easily be brought
20 to the courthouse and -- I mean, that's what --

21 THE COURT: Well, part of it is to see where it is
22 because that's part of the assessment of a view possibility as
23 well, is that people would go there to see it. If the jury
24 were to take a full view of it, I think it would be more
25 convenient to do it there than here. We have transport for the

1 jury anyway as a regular matter, so that's not a difficult
2 problem. But particularly given the construction, the snow and
3 everything else around here, to bring it someplace outside -- I
4 have rarely, but I have done a view on Courthouse Way of a
5 piece of industrial equipment once. They just brought it in on
6 a flatbed and everyone went outside but the weather conditions
7 were better at that time.

8 Anyway, so that's possible. I assume it's accessible
9 whenever you want?

10 MR. WEINREB: I assume so too. I'll check with the
11 FBI. It's at their facility.

12 MS. CLARKE: It's in a large warehouse with a lot of
13 other pieces of evidence stored there, so I don't know if that
14 would be too convenient.

15 THE COURT: Okay. Anyway, that's one of the things I
16 want to assess. If it's impractical to have a jury go there,
17 then that's one of the things I would like to look at.

18 So I had been thinking about doing that, perhaps on
19 Friday, but if, you know, there's a reason for doing it before
20 then because there's a pause in afternoon evidence or something
21 like that, maybe we could just put it together quickly.

22 MR. WEINREB: I'll talk to the FBI as soon as we get
23 out of here.

24 The other motion, from the government's standpoint,
25 that is essential for us is the 12.2 issue.

1 THE COURT: Right.

2 MR. BRUCK: We have a couple of quick matters to raise
3 this morning. One is to reiterate our concern about what could
4 be described as victim impact evidence regarding survivors; not
5 homicide victims but survivors. And the first witness,
6 Ms. Kensky, today has the most gripping, dramatic and terrible
7 story of the whole almost two years since the bombing. She
8 just recently had, I think, her second leg amputated.

9 MS. PELLEGRINI: That's correct.

10 MR. BRUCK: And, I mean, her 302 is replete with
11 evidence that the Court should consider but not in this trial.
12 Not now. We're not at penalty. And so we just want to renew
13 that motion that the government limit her testimony to her
14 injury and immediate sequelae and not the entire story that
15 followed.

16 MS. CLARKE: There's also Dr. Bath who's coming on,
17 and his 302 has a lot of that. Now, if the government is just
18 simply going to put in his observations -- he happened to be a
19 doctor nearby watching the marathon and then went to assist
20 with Martin Richard and then Lingzi Lu, and then he assisted
21 with I think --

22 MS. PELLEGRINI: Adrienne Haslet-Davis.

23 MS. CLARKE: -- Adrienne Haslet.

24 So his fact observations are one thing, but there's a
25 lot of impact on him that's in his 302, and that's what we seek

1 to limit. And there also is Matthew Patterson, I think, who
2 may also have some -- he was a firefighter on the scene, raced
3 over and picked up Jane Richard and took her off the scene and
4 then came back and I think helped with another couple of
5 people. And he may as well, other than just his factual
6 observations, have some impact on testimony and --

7 MR. BRUCK: And some military background.

8 MS. CLARKE: And also some military background.

9 MS. PELLEGRINI: Let me address those one at a time.
10 So with Jessica Kensky, Steve Mellin is doing the direct, so
11 he's not here to speak for himself at the moment, but I know
12 that he would say with respect to the amputation of her second
13 leg, that is just simply a continuation of the grievous
14 injuries that she suffered as a result of the blast and that
15 the jury should hear about that. Because Jessica could only
16 say that, in fact, immediately in the aftermath she lost one
17 leg, and then two years later, due to the injuries and the
18 nature of the injuries, she was forced to have the second leg
19 amputated.

20 THE COURT: So that raises a broader question that
21 I've been thinking about in terms of what your plan is with
22 respect to a second phase. Are you going to have the same
23 witnesses come back and amplify what they've said or are you
24 simply going to refer back to what they've said here?

25 MS. PELLEGRINI: In a couple of cases people will

1 repeat. So, for example, Bill Richard I would expect will be
2 testifying in the penalty phase as well, but we're also going
3 to ask that his wife Denise be permitted to testify in regard
4 to victim impact. So some of the folks are the same but there
5 are others who have not yet been called.

6 MR. WEINREB: I think it's fair to say largely they're
7 different. There will be a few overlap, but the penalty-phase
8 victim-impact testimony is much broader. It's, you know,
9 emotional sequelae, economic impact, social impact, the effect
10 on your marriage, the effect on your ability to earn a living,
11 upon your ability to enjoy life day by day given the loss you
12 suffered from the death of someone in the family and that sort
13 of thing.

14 MS. CLARKE: I think we're in agreement that the
15 victim-impact testimony in the penalty phase is limited to the
16 homicide victims, not the non-homicide victims. I think the
17 law is pretty clear on that.

18 THE COURT: I didn't think so, actually, when I looked
19 at it. Maybe you could --

20 MS. PELLEGRINI: There's also the grave --

21 THE COURT: I think it depends on the crime. That may
22 well be true in the crime of murder when there is a particular
23 victim, but the use of a weapon of mass destruction resulting
24 in death, I'm not sure it's clear that the person who escapes
25 death but is victimized by the use of the weapon of mass

1 destruction is not a victim within the statute.

2 MR. BRUCK: Well, I think that's right. The issue is
3 that the jury does not sentence for the non-capital counts, so
4 it's the whole question about who hears the evidence. The
5 judge hears that evidence, not the jury.

6 THE COURT: Well, anyway --

7 MS. CLARKE: We'd perhaps better focus on that.

8 THE COURT: Well, if the government's not going to
9 press it, it's more an academic point than anything else. But
10 let me come back to the --

11 MR. WEINREB: I don't think we were saying that.

12 THE COURT: Right. I understood Mr. Mellin to say
13 something similar the other day. So I think it is an academic
14 point but.

15 MR. WEINREB: I'm sorry. I meant to say the opposite.
16 We're not conceding the point.

17 THE COURT: Oh, you're not?

18 MR. WEINREB: No.

19 THE COURT: Oh, I thought he did.

20 MR. WEINREB: No. I think what he conceded only was
21 that during this portion of the trial that he agreed that that
22 other kind of victim-impact testimony would not be permitted
23 but that testimony about the physical injuries suffered by the
24 victims is admissible, even if it's injuries that they did not
25 become manifest until after the bombing itself, because the

1 bombing caused it. And we don't have to prove that this was
2 not just any old murder, which is not what they're charged
3 with, a weapon of mass destruction.

4 MS. PELLEGRINI: With respect to --

5 THE COURT: It still has to be focused on the question
6 of guilt of the offense, though.

7 MR. WEINREB: Yes.

8 THE COURT: And that's why I was asking about whether
9 some people would be back to amplify, because their testimony
10 could be more focused on the elements of the crimes charged.

11 MR. WEINREB: As a practical matter, we only have two
12 more victims testifying, so.

13 MS. PELLEGRINI: To speak to Dr. Bath, I was planning
14 to -- he made his observations, and to the extent that his
15 observations are detailed and graphic, I think the jury is
16 entitled to hear that. He's not, I don't believe -- and I'm
17 not going to lead him to the point where we're talking about
18 the effect, necessarily, it had on him, just what he saw as an
19 observer to the scene.

20 With Matt Patterson --

21 MS. CLARKE: If I could just interrupt very quickly,
22 some of the government witnesses have had a narrative that they
23 tell and they tell and tell and tell, and we would appreciate
24 it if government counsel would interrupt occasionally with a
25 question. That might help avoid the problem that Nadine is

1 talking about.

2 THE COURT: Yeah, that occurred to me a couple of
3 times last week, that perhaps the witness was going on a little
4 too long. I mean, it is direct examination and you want the
5 witness to give his or her own testimony, basically, but just
6 to be sure they don't stray off into some area that they
7 shouldn't be getting into.

8 MR. WEINREB: That's fine, your Honor. But I don't
9 think we should move forward on the premise that the defense
10 need not object during the testimony if they have an objection
11 to the question. I mean, it's not our job to anticipate their
12 objections. And some things can't be decided in advance. And
13 they may not want to object, but they decided to go to trial
14 and that's part of it.

15 MS. CLARKE: And I think Nadine has done a pretty good
16 job of interrupting and asking the witness a question and
17 guiding the witness's testimony. I just bring that up.

18 MS. PELLEGRINI: With respect to Matt Patterson,
19 again, I don't think Matt's testimony is necessarily victim
20 impact as a firefighter and an EMT. So he's had a lot of
21 experience. So I can't imagine that we're going to even touch
22 upon the impact it had on him. He's actually quite clinical in
23 that way; however, part of his background is that in the
24 military, where he received his basic military training,
25 including how to correctly apply a tourniquet, so I think that

1 that is important because he's the one who applied the
2 tourniquet to Jane Richard's leg.

3 MS. CLARKE: He also had EMT training outside the
4 military --

5 MS. PELLEGRINI: Yeah, both.

6 MS. CLARKE: -- so that could also suffice as his
7 training.

8 THE COURT: Well, if it's limited to training, but I
9 don't want to get into, you know, he was in combat in Iraq --

10 MS. PELLEGRINI: Well, actually, he was in Uzbekistan.

11 THE COURT: -- or wherever.

12 That may be worse.

13 MS. PELLEGRINI: But I don't actually believe he saw
14 combat. I think he was the military police. But can I at
15 least question -- and I can ask him ahead of time -- I'll
16 remind him ahead of time that we're not getting into the nature
17 of his service, just that he was in the service and received
18 some medical training there.

19 MS. CLARKE: We would ask that it just simply be that
20 he did receive medical training.

21 THE COURT: No, I think you can show just that.

22 MS. PELLEGRINI: Medical training in the --

23 THE COURT: No testimony about observing IEDs and
24 things like that.

25 MS. PELLEGRINI: Okay.

1 MR. BRUCK: One last request, and I'm sorry to prolong
2 this, but we would ask that when you caution the jury to avoid
3 publicity starting today and for the rest of the trial you
4 include any other criminal trial or case as well as this one,
5 and the reason has to do with the end of the Jody Arias case in
6 Arizona last week. That is the second-most high-profile death
7 penalty case going on in the country, and it ended in a really
8 very disturbing fiasco in which the jury split 11 to 1 for
9 death. That meant she gets life.

10 The holdout juror has been identified. The sheriff in
11 Phoenix is having to afford her protection because she is felt
12 to be in danger. The victim's family has held a press
13 conference to bemoan the fact that she did not go along with
14 the rest of the jury.

15 Whether any of our jurors have read about that we
16 don't know, but it is the most prejudicial type of publicity
17 one could imagine for a case of this type. The horse is out of
18 the barn as far as that goes, but who knows what is going to
19 happen in the future. And it just seems there's no reason why
20 jurors should be reading about other high-profile cases and
21 speculating about nonexistent connections between that one and
22 this one. So we would just ask the Court extend the
23 instruction.

24 MR. WEINREB: Well, I mean, I'm of two minds on this:
25 I have no objection in theory to the jurors not reading news

1 about it, but I don't want the record to reflect that if one of
2 them does come across some publicity about it, that they were
3 unable to shield themselves from, that then becomes a ground
4 for excusing jurors. I don't think that's fair. I mean, we
5 ask a lot of jurors, especially in a case like this. They have
6 to be very alert to avoid publicity about this case. The more
7 we keep expanding their responsibilities, the more likelihood
8 it is that there is going to be an accidental slip-up which can
9 create an issue.

10 So I think it's fine for the Court to say something
11 mild, you know, if possible, make your best efforts but we
12 understand -- something that makes it clear that we're not
13 going to be kicking people off the panel if they get exposed to
14 other case information.

15 THE COURT: Okay. I thought you were going to say
16 something else, actually. I thought you were going to talk
17 about the other possible pending cases in this court that are
18 related, which I do think they should be -- without naming
19 them, they should be discouraged from looking at.

20 MR. WEINREB: That's fine. I think cases related to
21 the marathon bombing would be easy for them because it all
22 falls within the same ambit --

23 THE COURT: They'll probably get reported that way.

24 MR. WEINREB: Yeah. Just glancing at it, they'll
25 probably assume it's part of the overall proceedings. But now

1 once we start getting into: Don't even allow yourself to be
2 exposed to any news about an unrelated case in Arizona, I think
3 that's asking too much of them.

4 MS. PELLEGRINI: One more thing, your Honor. So our
5 first witness today has a service dog. So I was told that that
6 would be permitted. Are you okay with that?

7 THE COURT: And one is in a wheelchair?

8 MS. PELLEGRINI: It's the same person.

9 THE COURT: Same person? We have a ramp, I'm told.
10 The ramp is in place?

11 THE CLERK: Yes, the ramp is hooked up.

12 Just to let you know, they did have to move the one
13 screen that was next to the witness box that's been used for
14 the --

15 THE COURT: Is it still operating?

16 THE CLERK: No, I think it's cut, at least for this,
17 so --

18 THE COURT: All right.

19 THE CLERK: It's just because of the way the
20 electronics --

21 THE COURT: Can they reset it up at the break?

22 THE CLERK: What the thought was -- because they need
23 about a half-hour, maybe a little more, to put up the ramp.
24 They were thinking maybe at lunch. Maybe this morning keep
25 everything as it is, then after the lunch break they'll be gone

1 and we'll go back to the normal setup.

2 THE COURT: That reminds me. We also met with the
3 staff on Friday to consider your concern about the camera.
4 They told us they rarely show the defense or the prosecution
5 tables, that when the witnesses are testifying, the camera is
6 almost exclusively on the witness. They don't shift around.

7 So if somebody's at the podium examining, they don't
8 go back and forth between the examiner and the witness; they
9 just keep focused on the witness. If there is a colloquy at
10 the tables, you know, that's extended, they'll cut to that, but
11 if it's just a one-word objection and a ruling, they don't
12 bother to go to counsel or me; they just keep it on the witness
13 so --

14 MS. CLARKE: Well, what they showed us was the camera
15 focused on counsel table. So that camera turns to witnesses?

16 THE COURT: No, they don't -- they may -- that is in
17 position for the podium principally. It's panned out to show
18 the courtroom generally, and I think they use it when the jury
19 comes in so that you don't see the jury coming in. But the
20 camera that is most commonly used is the one in the corner by
21 the jury that shoots across the room to the witness stand.

22 MS. CLARKE: So the one that's up to the Court's left
23 that looks focused on us --

24 THE COURT: Right. I'm told it's not used very much
25 at all.

1 MS. CLARKE: Because we asked about it and they showed
2 us the photo.

3 THE COURT: I mean, my recollection is they said they
4 will use that --

5 MS. CLARKE: I'm not trying to impeach the Court.

6 THE COURT: No. They will use that as sort of a
7 general scene when the jury comes in and then -- as a matter of
8 fact, what they said was they've been getting complaints from
9 the press in the overflow courtrooms that they aren't showing
10 other participants, including the defendant. So the press is
11 not happy that they're not showing the defendant.

12 MR. BRUCK: I have a feeling what may be happening is
13 when nothing else is going on, which is precisely the moment
14 that we would be interacting with our client, that's when they
15 would --

16 MR. WEINREB: Your Honor, just for the record, we
17 oppose this again, this idea that this should not be a public
18 proceeding in this respect. I mean, the jurors are positioned
19 to see everything that's going on at the defense table and
20 they're the ones that really matter. There's no reason why the
21 public should not be in a position to see what's happening in
22 the courtroom. If they see something that people in the
23 courtroom fortuitously could not see because they're positioned
24 behind the defense table, then all the better to have cameras
25 that make it more of a public proceeding. And the government

1 is also chatting with one another and passing notes or looking
2 at notebooks. We're all in the same boat here. And there's no
3 zone of privacy at all in a courtroom.

4 THE COURT: Well, I don't want the -- whatever
5 decisions of the IT staff to become an issue in the case. They
6 are -- so they're doing what they've done in other cases, I
7 guess, and they're following that, and that is that they focus
8 on the testimony given by the witness, essentially. There are
9 other scenes that are seen. I'm sure that if, you know, during
10 the preliminaries, my instructions, I'm sure the camera was on
11 me rather than elsewhere.

12 So they're generally focusing on who's doing the
13 talking. And in examination and witness, that's the witness,
14 not the examiner. And they don't try to go back and forth, so
15 I'm told. There may be general scenes other than that, but
16 it's not like the camera is staring at the defense table
17 throughout the proceedings.

18 MR. WEINREB: Just so the record is complete on this
19 issue, the victims have a statutory right to witness the
20 proceedings and they can't all be in the room, and this is an
21 opportunity for them to witness everything that's going on in
22 the courtroom, not just a little slice of it.

23 There's one other thing that I would actually like to
24 raise in open court, if we could just have one moment before we
25 call in the jury, and that's the government was going to inform

1 the Court that the media has filed various motions for access
2 to exhibits and other things, and we intend to respond, and we
3 were going to ask that we be given until Friday, the end of the
4 week to do so. And I think it would be useful to have that on
5 the record so everybody knows what's happening.

6 THE COURT: Fine. Thank you.

7 MS. PELLEGRINI: Can we have a couple of minutes so I
8 could get ready?

9 THE COURT: Yup. Yup.

10 (The proceedings adjourned at 9:15 a.m.)
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C E R T I F I C A T E

I, Marcia G. Patrisso, RMR, CRR, Official Reporter of the United States District Court, do hereby certify that the foregoing transcript constitutes, to the best of my skill and ability, a true and accurate transcription of my stenotype notes taken in the matter of Criminal Action No. 13-10200-GAO, United States of America v. Dzhokhar A. Tsarnaev.

/s/ Marcia G. Patrisso
MARCIA G. PATRISSE, RMR, CRR
Official Court Reporter

Date: 9/25/15